

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11	VICTOR PARRA,)	Civil No. 08-0472-J(LSP)
)	
12	Petitioner,)	ORDER GRANTING PETITIONER'S
)	MOTION TO HOLD FEDERAL HABEAS
13	v.)	PETITION IN ABEYANCE
)	(Doc. #12)
14	JAMES TILTON, Warden,)	
)	
15	Respondent.)	
	_____)	

16
17 On March 13, 2008, Petitioner Victor Parra ("Petitioner"), a
18 state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas
19 Corpus. On April 28, 2008, Respondent filed an Answer to the Petition.
20 On May 29, 2008, Petitioner filed a Motion for Stay and Abeyance
21 ("Motion to Stay & Abey") that is now pending before the Court.
22 Respondent does not oppose the Motion.

23 Petitioner's Motion seeks an order staying the proceedings so he
24 can exhaust his state court remedies as to claim no. 1 in the
25 Petition. Respondent does not oppose the Motion. Instead, Respondent
26 advocates that Petitioner should be required to return to state court
27 to exhaust claim no. 1 in light of the United States Supreme Court's
28

1 decision in *Cunningham v. California* __U.S.__, 127 Sct. 856 (2007)¹
2 (Points & Authorities in Support of Answer at 5-7)

3 For the reasons outlined below, the Court GRANTS Petitioner's Motion
4 to Stay & Abey.

5 I.

6 Exhaustion

7 The exhaustion of available state remedies is a prerequisite to a
8 federal court's consideration of claims presented in a habeas corpus
9 proceeding. 28 U.S.C.A. § 2254(b) *Rose v. Lundy*, 455 U.S. 509, 522
10 (1982). In *Rose v. Lundy*, the Supreme Court held "a district court
11 must dismiss habeas petitions containing both unexhausted and
12 exhausted claims." *Id.* Such a dismissal leaves "the prisoner with
13 the choice of returning to state court to exhaust his claims or of
14 amending or resubmitting the habeas petition to present only exhausted
15 claims to the district court." *Id.* at 510.

16 Petitioner's Petition contains both exhausted and unexhausted
17 claims. (Points & Authorities in Support of Motion to Stay & Abey at
18 1-2) Petitioner's claim no. 1 actually states two claims, one of which
19 is exhausted and one of which is unexhausted. In claim no. 1,
20 Petitioner asserts that he was denied his constitutional right to have
21 a jury determine all facts essential to his sentence. This type of
22 claim was specifically addressed in *Apprendi v. New Jersey* 530 U.S.
23 466 (2000)² and *Cunningham*, supra, a decision that was issued after

24
25 ¹Cunningham holds that California's sentencing scheme violates the Sixth
26 Amendment to the extent it permits a judge to impose an upper sentencing term based
on facts not found by a jury beyond a reasonable doubt or admitted by a defendant.
Cunningham, supra, at 868.

27 ²Apprendi holds that a defendant's Fourteenth Amendment right to due process
28 and Sixth Amendment right to a jury trial requires that "other than the fact of a
prior conviction, any fact that increases the penalty for a crime beyond the
prescribed maximum must be submitted to a jury and proved beyond a reasonable

1 Petitioner's conviction became final. Petitioner's *Apprendi* claim was
2 presented to the California Supreme Court. (Respondent's Lodgment No.
3 4 at 15-17) Therefore, the claim is exhausted. However, Petitioner's
4 *Cunningham* claim was not, and could not have been, presented to the
5 California Supreme Court. Therefore, Petitioner's *Cunningham* claim is
6 unexhausted.

7 II

8 Stay and Abeyance

9 When *Rose v. Lundy* was decided, there was no statute of
10 limitations for filing a federal habeas corpus petition; after
11 exhausting claims in state court, a petitioner could return to federal
12 court "with relative ease." *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct
13 1528, 1533 (2005). However, AEDPA changed many aspects of federal
14 habeas corpus proceedings, including the application of the one-year
15 statute of limitations for bringing a habeas corpus petition in
16 federal court, which is set forth in 28 U.S.C. §2244(d). In *Rhines*,
17 the Supreme Court recognized petitioners can effectively be denied the
18 opportunity for collateral review in federal court "[a]s a result of
19 the interplay between AEDPA's 1-year statute of limitations and [*Rose*
20 *v.*] *Lundy*'s dismissal requirement." *Rhines*, 125 S.Ct. at 1533-1534.
21 Therefore, the *Rhines* court held that federal courts have discretion
22 to stay mixed petitions and to hold habeas proceedings in abeyance
23 while the petitioner returns to state court to exhaust all claims.
24 *Id.* at 1534-1535.

25 The *Rhines* court also held that stay and abeyance "should be
26 available only in limited circumstances." *Id.* at 1535. If employed
27 too often, the procedure could undermine the purposes of AEDPA,

28 _____
doubt..." *Apprendi* 530 U.S. at 490

1 namely, to reduce delay and streamline federal habeas corpus
2 proceedings. *Id.* at 1535. In this regard, the Supreme Court stated
3 "it likely would be an abuse of discretion for a district court to
4 deny a stay and to dismiss a mixed petition if the petitioner had good
5 cause for his failure to exhaust, his unexhausted claims are
6 potentially meritorious, and there is no indication that the
7 petitioner engaged in intentionally dilatory litigation tactics." *Id.*

8 Good Cause

9 Petitioner argues that he had good cause for his failure to
10 exhaust his unexhausted claim because *Cunningham* was decided after his
11 conviction became final. Therefore, the state courts should address
12 his claim in light of *Cunningham*. Respondent does not dispute
13 Petitioner's argument.

14 Claim is Potentially Meritorious

15 Petitioner's claim is potentially meritorious. Specifically,
16 *Cunningham* addresses the same issue raised by Petitioner and the state
17 courts have not had the opportunity to address Petitioner's claim in
18 light of *Cunningham*.

19 Intentionally Dilatory Litigation Tactics

20 It does not appear that Petitioner's raising of his unexhausted
21 claim at this time is the result of dilatory litigation tactics.

22 The Supreme Court in *Rhines* did not define "good cause," but did
23 acknowledge AEDPA's one-year statute of limitations "'serves the well-
24 recognized interest in the finality of state court judgments'" because
25 it "'reduces the potential for delay on the road to finality by
26 restricting the time that a prospective federal habeas petitioner has
27 in which to seek federal habeas review.'" *Rhines* 125 S.Ct. at 1534,
28 quoting *Duncan v. Walker*, 533 U.S. 167, 179 (2001). The Supreme Court

1 also suggested a broad definition of "good cause" would be contrary to
2 AEDPA because it would not "be compatible with AEDPA's purposes." *Id.*
3 at 1534.

4 In a decision issued shortly after *Rhines*, the Supreme Court *in*
5 *dicta* addressed one circumstance which would qualify as "good cause"
6 for failing to exhaust state court remedies before a federal petition
7 is filed. In *Pace v. DiGuglielmo*, 125 S.Ct. 1807, 1810-1811 (2005),
8 the Supreme Court resolved a split among the circuits as to the
9 application of section 2244(d)(2), which tolls AEDPA's one-year
10 statute of limitations while a "properly filed application for State
11 post-conviction or other collateral review" is pending. 28 U.S.C.
12 2244(d)(2) In *Pace*, the court held that an application for state post-
13 conviction relief is not "properly filed" for purposes of
14 section 2244(d)(2) if it is considered untimely under state law. *Id.*
15 at 1810. In reaching its decision, the *Pace* court addressed a
16 fairness argument by the petitioner who claimed a "petitioner trying
17 in good faith to exhaust state remedies may litigate in state court
18 for years only to find out at the end that he was never 'properly
19 filed,' and thus that his federal habeas petition is time barred." *Id.*
20 at 1813 Citing its prior decision in *Rhines*, the Supreme Court
21 responded to the petitioner's argument as follows: "A prisoner seeking
22 state post-conviction relief might avoid this predicament, however, by
23 filing a 'protective' petition in federal court and asking the federal
24 court to stay and abey the federal habeas proceedings until state
25 remedies are exhausted.

26 Following the Supreme Court's decision in *Rhines*, the Ninth Circuit
27 held the "good cause" standard prescribed by *Rhines* is less stringent
28 than the "extraordinary circumstances" standard, which the Ninth Circuit

1 applies in the context of equitable tolling of AEDPA's one-year statute
2 of limitations. *Jackson v. Roe* 425 F.3d 654, 661-662 (9th Cir. 2005).
3 "[E]quitable tolling of AEDPA's one-year statute of limitation is
4 available . . . only when 'extraordinary circumstances beyond a
5 prisoner's control make it impossible to file a petition on time.'" *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005),
6 quoting *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "That
7 determination is 'highly fact-dependent'" and the petitioner "'bears the
8 burden of showing that equitable tolling is appropriate.'" *Id.* quoting
9 *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005) and *Whalem/Hunt v.*
10 *Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (*en banc per curiam*). For
11 example, "extraordinary circumstances" exist where a habeas petitioner
12 is denied access to legal materials for a significant period of time.
13 *Espinoza-Matthews*, 432 F.3d at 1027-1028; *Lott v. Mueller*, 304 F.3d 918,
14 921-925 (9th Cir. 2002).

15
16 District courts interpreting the *Rhines* "good cause" standard have
17 taken markedly different approaches. Despite the Ninth Circuit's
18 endorsement of a lenient standard in *Jackson*, some district courts in
19 the Ninth Circuit have applied a more stringent standard, finding "it
20 appropriate to look to procedural default case law for guidance in
21 determining whether petitioner has demonstrated the requisite 'good
22 cause' for failing to exhaust . . . unexhausted claims prior to filing
23 [a federal] habeas action." *Hernandez v. Sullivan*, 397 F.Supp.2d 1205,
24 1207 (C.D. Cal. 2005). For example, in *Johnson v. Sullivan* 2006 WL
25 37037 (C.D. Cal. Jan. 4, 2006), petitioner argued that he had "good
26 cause" for his failure to exhaust because his appellate counsel was
27 ineffective on direct appeal and because he did not know the claim was
28 unexhausted when he filed his federal petition. *Id.* at *2. The

1 district court rejected the Ninth Circuit's conclusion in *Jackson* that
2 "good cause" is less stringent than the "extraordinary circumstances"
3 standard applied to determine whether a petitioner is entitled to
4 equitable tolling of the statute of limitations. *Id.* at *3 n.4.
5 Instead, the district court concluded "the good cause standard for
6 failure to exhaust may be analogized to the 'cause' required to overcome
7 a procedural bar." *Id.* at *3. In the procedural default context,
8 "'cause' usually means some objective factor external to the petitioner
9 which gave rise to the default." *Id.* at *3. Under this more stringent
10 standard, the district court concluded the petitioner had not
11 established good cause for failing to exhaust his state court remedies.
12 The district court reasoned that an error by appellate counsel on a
13 discretionary appeal was not enough to establish good cause because
14 "counsel's conduct did not prevent petitioner from seeking state habeas
15 relief on the unexhausted claim." *Id.* at *3. The district court also
16 concluded the petitioner's lack of knowledge was "not an objective
17 factor external to petitioner which prevented compliance with the
18 exhaustion requirement." *Id.* at *3. To justify its reliance on a more
19 stringent standard than the one set forth by the Ninth Circuit in
20 *Jackson v. Roe*, the district court reasoned it would defeat the purpose
21 of exhaustion if a petitioner's "lack of knowledge" could establish
22 "good cause" because "any petitioner could claim lack of knowledge to
23 continually amend their petition." *Id.* at *3.

24 Another court has opined that "good cause" should be determined by
25 alluding to "excusable neglect," noted in *Pioneer Inv. Services v.*
26 *Brunswick Assoc.* 507 U.S. 394 (1993). *Corjasso v. Ayers* 2006 WL 618380
27 (E.D. Cal. March 9, 2006) The *Corjasso* court indicated that it would
28 look to factors such as prejudice to the non-moving party, length of the

1 delay and its effect on efficient court administration, whether the
2 delay was caused by factors beyond the control of the movant, and good
3 faith. *Id.* at *1

4 In other contexts, the Ninth Circuit has held "good cause" requires
5 a showing of diligence. *Zivkovic v. Southern California Edison Co.*, 302
6 F.3d 1080, 1087-1088 (9th Cir. 2002); *Coleman v. Quaker Oats Co.*, 232
7 F.3d 1271, 1294-1295 (9th Cir. 2000); *United States v. Te Selle*, 34 F.3d
8 909, 910 -911 (9th Cir. 1994); *Johnson v. Mammoth Recreations, Inc.*, 975
9 F.2d 604, 609 (9th Cir.1992); *Fimbres v. United States*, 833 F.2d 138, 139
10 (9th Cir. 1987); *Townsel v. Contra Costa County*, 820 F.2d 319, 320-321
11 (9th Cir.1987); *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir.1985).
12 "[C]arelessness is not compatible with a finding of diligence and offers
13 no reason for a grant of relief." *Johnson*, 975 F.2d at 609, citing
14 *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th
15 Cir.1992). Ignorance of the law and inadvertent failure to calendar a
16 deadline have also been found incompatible with diligence and good
17 cause. *Townsel*, 820 F.2d at 320-321; *Wei*, 763 F.2d at 372.

18 In this case, Petitioner requests that the Court hold his Petition
19 in abeyance while he returns to state court in order to exhaust his
20 state remedies for a claim that was not presented to the state courts
21 because the law that applies to his unexhausted claim was decided by the
22 U.S. Supreme Court after his conviction became final. However, the
23 Ninth Circuit has not decided whether the good cause standard stated in
24 *Rhines* or the standard established in *Calderon v. U.S. District Court*
25 (*Taylor*)134 F.3d 981, 988, n.11 (9th Cir. 1988) *cert. denied* 525 U.S. 920
26 (1998) applies to a case where a petitioner seeks to litigate a new
27 unexhausted claim in state court, while his exhausted petition is
28 pending in federal court.

1 The Ninth Circuit has noted that *Rhines* and *Taylor* apply to
2 different types of petitions: "*Rhines* applies to stays of mixed
3 petitions, whereas (*Taylor*) applies to stays of fully exhausted
4 petitions and requires additional steps - the amendment of the
5 original...petition and an...amendment to add the newly exhausted
6 claims." *Jackson* 425 F.3d at 661.

7 In this case, Petitioner's Petition is a mixed petition in that it
8 contains one exhausted claim and one unexhausted claim. Therefore,
9 *Rhines* applies in this case.

10 *Rhines* indicates that it applies to the question of whether a
11 district court has discretion to stay a mixed petition to allow the
12 petitioner to present his unexhausted claims to the state court, and
13 then return to federal court for review of the completely exhausted
14 petition. *Rhines* 125 S.Ct. at 1531.

15 In *Riner v. Crawford*, 415 F.Supp 2d 1207 (D. Nev. 2006), the court
16 held that the *Rhines* good cause standard applicable in consideration of
17 a petitioner's request for stay and abeyance of his federal habeas
18 petition

19 requires the petitioner to show that he was prevented from
20 raising the claim, either by his own ignorance or confusion
21 about the law or the status of his case, by circumstances
22 over which he had no control, such as actions by counsel,
23 either in contravention of the petitioner's clearly
24 expressed desire to raise the claim, or when petitioner
25 had no knowledge of the claim's existence.
26 *Riner* 415 F. Supp. at 1211 (emphasis added)

27 See also *Franck v. Hubbard* 2008 WL 755925 (S.D. Cal. Mar. 18, 2008),
28 *Lewis v. Dexter* 2008 WL 901457 (C.D. Cal. Mar. 27, 2008), *Haithcock v.*
Veal 2007 WL 935471 (S.D. Cal. Mar. 19, 2007); *Leonardos v. Buddress*
2007 WL 1174282 (N.D. Cal. Apr. 19, 2007), *Medina v. Woodford* 2006 WL
2844578 (N.D. Cal. Oct. 2, 2006)

1 Petitioner has shown a legitimate reason that warrants the delay of
2 the proceedings in this Court while he exhausts his *Cunningham* claim in
3 state court. *Cunningham*, a United States Supreme Court decision, was
4 decided after Petitioner's conviction became final. The precise issue
5 raised by Petitioner pending before this Court is directly addressed by
6 *Cunningham*. In fact, the California Supreme Court denied Petitioner's
7 Petition for Review "without prejudice to any relief to which
8 (Petitioner) might be entitled after the United States Supreme Court
9 determines Cunningham v. California..." (Respondent's Lodgment No. 5)

10 The Ninth Circuit has held that a federal court may deny an
11 unexhausted claim on the merits only when it is perfectly clear that the
12 petitioner does not raise even a colorable federal claim. *Cassett v.*
13 *Stewart* 406 F.3d 614, 624 (9th Cir. 2005) Therefore, if a petitioner
14 states a colorable claim, the claim is not plainly meritless. Here,
15 since Petitioner's claim appears to be at least "colorable," it is not
16 plainly meritless under *Rhines'* second prong. *Lugo v. Kirkland* 2006 WL
17 449130 (N.D. Cal. Feb. 22, 2006) at *4

18 Consequently, the Court concludes that Petitioner has shown good
19 cause for his failure to exhaust his newly discovered claim. As a
20 result, there is no reason not to stay this action while Petitioner
21 exhausts his new claim. *Lugo* at *4, *Briscoe* at *1-2

22 Therefore, Petitioner's Motion to Stay and Abey his Petition
23 for Writ of Habeas Corpus is GRANTED.

24 The Petition for Writ of Habeas Corpus is stayed until December 5,
25 2008.

26 Within 30 days of the date of this Order, Petitioner shall file a
27 Petition for Writ of Habeas Corpus in the appropriate state court. The
28 Petition for Writ of Habeas Corpus shall include the new unexhausted

1 claim. Petitioner shall provide to this Court proof that the Petition
2 for Writ of Habeas Corpus was filed in the state court. If Petitioner
3 does not file a Petition for Writ of Habeas Corpus in the appropriate
4 state court within 30 days of the date of this Order, Petitioner shall
5 file with the Court a declaration explaining why such Petition was not
6 filed.

7 Within 30 days after the state court has ruled on the Petition for
8 Writ of Habeas Corpus and the new unexhausted claim is exhausted,
9 Petitioner shall file an Second Amended Petition for Writ of Habeas
10 Corpus in this Court containing his new claim. Petitioner shall provide
11 to the Court proof of when the California Supreme Court rules on his new
12 claim.

13 Petitioner shall provide to the Court monthly reports regarding the
14 status of his petition(s) filed in the state courts.

15
16 CONCLUSION

17 The Court, having reviewed the Petition, Petitioner's Motion to Stay
18 and Abey, Respondent's Answer to the Petition, and the pertinent
19 authorities pertaining to the Motion, and GOOD CAUSE APPEARING, hereby

20 \\
21 \\
22 \\
23 \\
24 \\
25 \\
26 \\
27 \\
28 \\
\\

1 GRANTS Petitioner's Motion to Stay and Abey.
2
3
4
5
6

7 DATED: June 5, 2008
8
9



Hon. Leo S. Papas
U.S. Magistrate Judge